SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

SAMUEL COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 448 F. 2d 1224.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1971, and a petition for rehearing was denied on November 19, 1971. The petition for a writ of certiorari was filed on December 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in commodity trading regulated under the Commodity Exchange Act of 1936, individual transactions in excess of the position limit prescribed under that Act after such limit has already been exceeded constitute separate offenses.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Commodity Exchange Act of 1936 and the regulations thereunder are set forth at Pet. 2-3.

STATEMENT

After a trial without a jury in the United States District Court for the Southern District of New York, petitioner was convicted on eleven counts charging specific instances of trading in commodity futures in excess of the applicable overall trading limit prescribed under the Commodity Exchange Act of 1936, in violation of 7 U.S.C. (1964 ed.) 6a(2)(B), and on three counts charging specific instances of trading such futures in excess of the applicable one-day trading limit fixed under the Act, in violation of 7 U.S.C. (1964 ed.) 6a(2)(A).[1] Petitioner was fined $10,000 on each of the fourteen counts on which he was convicted. The court of appeals affirmed (Pet. App.).

The pertinent facts are not in dispute and are set forth fully in the court of appeals' opinion. This prose-

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[1] Three co-defendants, petitioner's two sons and his business associate, were acquitted on all counts. Petitioner was acquitted on an additional count charging conspiracy, and did not appeal his convictions under the counts charging violation of the one-day limit.

cution arose from petitioner's trading in commodity futures (May 1966 potato futures) during the period from June 1965 to May 1966. Petitioner engaged in various trades which resulted in his having more futures than permitted, and these transactions were the basis of the counts charging him with violating the overall trading limits set pursuant to the Act. In all but one of the transactions, petitioner's position in the commodity exceeded the overall limit before, as well as after, the trade. Petitioner was charged and convicted on a separate count for each transaction.

In the court below, petitioner argued that once the overall limit had been exceeded, all further transactions were only part of a single course of conduct, the original act of exceeding the limit, and thus constituted only a single offense under the Act. He urged that his convictions under the counts charging violations after the limit was already exceeded therefore should be set aside. The court of appeals concluded that the Act was "unambiguous" in making each transaction a separate offense, and accordingly affirmed petitioner's conviction on all counts (Pet. App. 6).

ARGUMENT

Petitioner contends here, as in the court below, that transactions entered into after the overall limit prescribed under the Act has been exceeded do not constitute separate offenses under the Act. The statute involved here (7 U.S.C. (1964 ed.) 6a(2)(B)) makes it unlawful for a person "to buy or sell, or agree to buy or sell, * * * any amount of such commodity that shall result in giving such person a net * * * position at any

one time in or with respect to any such commodity in excess of any trading limit * * *." We agree with the court below that this language is "unambiguous," and that "[e]ach purchase or sale or contract to buy or sell in excess of authorized limits thus constitutes a separate violation * * *" (Pet. App. 6-7). Each transaction was a separate offense, and the separate convictions based on these separate offenses were proper.[2]

The cases on which petitioner relies as requiring a "policy of lenity" in construing the "unit of prosecution" intended by a statute (Pet. 8) have no application to the situation here. The rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596.

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[2] Under petitioner's construction of the statute, a speculator who exceeded the trading limit, subsequently reduced his holdings below the limit, and then again exceeded the limit would have committed a separate offense each time that he exceeded the limit. On the other hand, a speculator who continuously exceeded the trading limit would have committed only one offense, regardless of the number of transactions entered into by him after doing so and even though the effect of his trading on the market was great. We do not believe that Congress intended this result, which plainly conflicts with the Act's remedial purposes.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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